The Winchell Company *and* Graphic Communications International Union, Local 14-M, AFL–CIO–CLC. Cases 4–CA–20340 and 4–CA–20987

November 3, 1994

DECISION AND ORDER

BY MEMBERS DEVANEY, BROWNING, AND COHEN

On February 28, 1994, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that The Respondent, the Winchell Company, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On April 5, 1994, the General Counsel filed a motion to strike the Respondent's exceptions and brief in support of exceptions because they did not comply with the Board's Rules and Regulations Sec. 102.46(b)(1) and Sec. 102.46(j). These sections require that where a brief in support of exceptions is filed, argument or citation of authority should be set forth only in the brief which is limited to 50 pages. On April 6, 1994, the Executive Secretary requested that the Respondent submit its exceptions in proper format on or before April 11, 1994. On April 7, 1994, the Respondent filed its amended exceptions. On April 18, 1994, the General Counsel filed a motion to strike the Respondent's amended exceptions and brief in support of exceptions on the same grounds as stated in the General Counsel's previous motion. On April 20, 1994, the Respondent filed a motion to strike, or alternatively to deny, the General Counsel's motion to strike the Respondent's amended exceptions. On that same day, the Executive Secretary notified the parties that the matter had been forwarded to the Board. On April 25, 1994, the General Counsel filed a response to the Respondent's motion to strike the General Counsel's motion to strike the Respondent's amended exceptions.

The General Counsel's motion to strike the Respondent's amended exceptions, and the Respondent's motion to strike the General Counsel's motion are denied. We have not, however, considered any argumentation or citation of authority in support of the exceptions contained in the Respondent's enumerated exceptions, and we have considered only the argumentation and citation of authority contained in the Respondent's brief in support of its enumerated exceptions.

[2] In its exceptions, the Respondent argues, contrary to the judge's findings, that its 1988–1989 decision to invest in desktop computers changed the way it related to its customers and therefore changed the scope and direction of the Respondent's business as in *Noblit Bros*., 305 NLRB 329 (1992). We disagree with the Respondent and find *Noblit* inapplicable.

In that case, telephone sales work began as random order taking and question answering. However, after the installation of computers and a telemarketing program, the work involved concentrated efforts at selling. Each telemarketer was assigned a geographical area where he or she was responsible for servicing customers and building accounts through an aggressive initiation of sales and pursuit of sales. The Board held that this change in telephone sales work was a basic change in the scope and direction of the enterprise.

We find no such change here. The Respondent alleges that the desktop computers eliminated the work of prepress personnel such as artists and typesetters since this work was now done by customers who forwarded it to the Respondent via computer disks. Nevertheless, the Respondent still related to its customers in the same way. The change entailed customers performing the initial steps of the printing process for themselves. Thus the technological advance of the desktop computers changed the Respondent's operation by degree not kind. The Respondent still performed those steps necessary to provide the finished printed product to the customer. The Respondent merely engaged in slightly fewer steps than theretofore. This is not the change in kind as occurred in *Noblit*. Moreover, the Respondent admits that the volume of business attributable to desktop sales remained small and reached only 2 percent of the Respondent's overall sales in 1992. Accordingly, under all these circumstances, we agree with the judge that the Respondent's decision to invest in desktop computers did not change the direction and scope of the Respondent's business.

Member Cohen does not agree with his colleagues that the five business decisions antedating the layoffs involved here fall within the second category of decisions described in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). In his view, they more appropriately fall within the ambit of category 3 and thus would not necessarily involve mandatory subjects of bargaining. However, in his view, it is unnecessary to decide whether these decisions were actually mandatory subjects of bargaining, because there is insufficient credited evidence to establish a causal nexus between these decisions and the layoff decisions involved here.

With respect to the layoff decisions themselves, Member Cohen applies the balancing test of ''category 3'' decisions and finds, based on the credited evidence, that the layoffs were not the result of a change in the scope and direction of the enterprise. Rather, the layoff decisions were motivated by a loss of business and a concomitant desire to save on labor costs. Thus, Member Cohen concludes that the decisions to layoff here were mandatory bargaining subjects.

Scott C. Thompson, Esq., for the General Counsel.

Steven R. Semler, Esq. (Semler, Pritzker & Silverman), of Washington, D.C., for the Respondent.

Thomas D. Allison, Esq. (Cotton, Watt, Jones & King), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These cases were tried in Philadelphia, Pennsylvania, on May 24, 1993. The charge in Case 4–CA–20340 was filed December 23, 1991 (amended April 20 and May 29, 1992), and the complaint was issued May 29, 1992. The charge in Case 4–CA–20987 was filed August 17, 1992 (amended October 21), and the complaint was issued and the cases consolidated January 27, 1993.

On July 19, 1991, the Union was certified as the representative of a unit of lithographic production employees. On November 7, 1991, the Company unilaterally laid off 9 of its over 80 bargaining unit employees and on June 18, 1992, an additional 14 unit employees. As the Company admits in its brief, its sole reason for having refused to bargain over the layoffs was ''the pendency of . . . judicial review of the validity of the certification.'' On September 9, 1992, the Court of Appeals for the Third Circuit issued a memorandum opinion, enforcing the Board's bargaining order and taxing costs against the Company.

The Company informed the employees being laid off that the layoffs resulted from ''a continued severe business downturn in the graphic arts business that started in late 1988.'' It informed other employees that it was cheaper for the Company to have a layoff and have the remaining employees work extra hours, saving on employee benefits. Before the trial, the Company took the position that the layoffs were ''the result of the recession that hit the Graphic Arts Industry in Philadelphia'' and told the Union that ''price competition is cut-throat.''

Shifting positions, the Company contended at the trial and contends in its brief that the layoffs were a result of business decisions rather than a generalized economic downturn in the printing industry, were not in any way motivated by the cost of labor or issues relating to the cost of labor, and therefore were not a mandatory subject of bargaining. The Company further contends that Case 4–CA–20340, involving the November 7, 1991 layoffs, is barred by the *Jefferson Chemical* doctrine and that both the November 7, 1991 and the June 1992 layoffs were permanent layoffs and for that reason, ''not a mandatory subject of bargaining.''

The primary issues are whether the Company, the Respondent, unlawfully laid off lithographic production employees on November 7, 1991, and June 18, 1992, without prior notice to the Union and without affording it an opportunity to bargain over the layoff decisions and their effects, violating Section 8(a)(5) and (1) of the National Labor Relations Act.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Company, and Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, provides graphic arts services to commercial and financial customers at its facility in Philadelphia, Pennsylvania, where it annually receives goods valued over $50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Business Downturn and Competitive Disadvantage*

The Company is a full-service commercial printer, printing such material as brochures and financial and other documents in the graphics arts industry. Its full services extend ''from design through bindery through literature distribution.'' Operating as a ''huge job shop,'' it performs many large and small jobs for a wide range of customers, including large customers that provide a steady flow of work. (Tr. 14–16, 55, 80; G.C. Exh. 10 p. 1.)

In 1988, as its records show (R. Exh. 11), the Company's sales totaled $32.07 million. In 1989 the sales declined 14.7 percent, to $27.36 million. In 1990 the sales declined a further 8.1 percent, to $25.15 million. In 1991, as the recession continued, the sales declined another 6.5 percent, to $23.52 million. In 1992 the sales recovered 3.5 percent, to $24.35 million, which was still 24.1 percent below the 1988 sales.

Vice President George Finley testified about a competitive disadvantage (Tr. 22, 24):

> A. It is the company's position that other printing firms outside of our immediate geographical area are coming into this market with lower wage and benefit packages, yes.
>
> Q. And as a result of that competitive disadvantage, the company is not getting work that it might otherwise get. Has that been the company's position?
>
> A. Yes.
>
> . . . .
>
> Q. Okay. Now, were there other competitive problems that [the Company] was facing other than the ones that we've just discussed with respect to the wage and benefits that were discussed at the bargaining table?
>
> A. *Manning*. [Emphasis added.]

Since the Company began negotiating in October 1992 (over 3 years after the Union filed the representation petition on June 19, 1989, and following court enforcement of the Board's bargaining order), the Company informed the Union (C.P. Exh. 2; Tr. 36, 166):

> There has been serious erosion in the market in the Philadelphia area in the past 2 years whereby volume has been reduced at all printers, *price competition is cut-throat*, and the printing industry has experienced a record number of restructurings and Chapter 11 situations. There is still no immediate sign of any improvement in the fundamentals in our industry despite some minor improvement in the economy. [Emphasis added.]

Financial Printing. Finley testified specifically about the Company's competition in its financial printing business, which consists of printing prospectuses, initial public offerings, stock offerings, bond issues, and bankruptcy hearings (Tr. 142). He testified that ''beginning in 1984 and continuing through 1989, four major financial printers moved into the Philadelphia market. . . . We looked into *increasing our financial market* and found that it was *financially unappealing*'' [emphasis added], because it would require the major acquisition of a new web press costing $4 million. He recalled that ''the company looked into it I guess over the span of 1986 to 1988,'' but decided against the investment. (Tr. 66–67, 74–76.)

This decision had little immediate effect on the volume of the Company's financial printing. Its 1988 financial sales were $3.97 million (included in the Company's total sales of $32.07 million). In 1989—despite the market crash, when the ''whole bottom fell out of the [financial printing] market,''

[1] The General Counsel's and Company's unopposed motions to correct the transcript are granted and received in evidence as G.C. Exh. 17 and R. Exh. 21.

and despite the resignation of the separate financial printing sales manager—the Company's financial sales declined only 6.3 percent, to \$3.72 million. In 1990 (with the same sales staff of six, working under the commercial sales manager), the financial sales *increased* 13.4 percent, to \$4.22 million. In the next 2 years, however, evidently because of the claimed competitive disadvantage, there was a precipitous drop in financial sales, to \$2.24 million in 1991 and \$866,208 in 1992. (R. Exh. 12; Tr. 75–76, 151.)

These sales figures, from the Company's financial printing division, do not include ''annual reports for corporations around the country'' or the printing of prospectuses and other documents for the financial firm, Vanguard (the mutual fund family). The Company considers this printing to be part of its ''commercial work.'' (Tr. 142–143.)

Concerning the printing of prospectuses and other documents for Vanguard, Finley testified that in negotiations, the Company told the Union that it needed certain things at the bargaining table to compete with Donnelly, one of the four major financial printers that had moved into the Philadelphia market. Finley testified that Donnelly competes ''very strongly with us for our Vanguard business.'' (Tr. 143–144.)

Advertising Agency. Most of the sales of another company division were also lost to the competition. This was the marketing communications division, which operates as an advertising agency, designing and producing brochures for businesses. In 1988 its sales were \$4.65 million. (Tr. 79–80; R. Exh. 14.)

In late 1988 the chairman of the division resigned and went to a competitor. Shortly thereafter, two of the top sales executives and two writers also resigned and started their own agency. The resigning executives took two principal clients with them, leaving the agency in ''shambles.'' The 1989 sales declined 63 percent, to \$1.71 million. In that competitive climate, the Company decided not to replace the separate chairman and attempt to rebuild the business. It decided instead to attempt to preserve the residual business with its remaining clients. For the next 2 years it largely succeeded, with sales of \$1.59 million in 1990 and \$1.62 million in 1991. In 1992, however, after it lost another principal client to another agency, its sales declined to \$894,309. (Tr. 81–84, 118–119; R. Exh. 14.)

Bar Association Contract. In 1991 the Company lost to a competitor its large contract to print the Philadelphia Bar Association legal directory, biweekly newspaper, and quarterly magazine, for which the Company charged \$686,000 in 1990 (Tr. 85–88, 124–127.)

Desktop Publishing. In the Company's union negotiations before the trial, it informed the Union that ''newer technology such as desktop publishing has eroded the 'total sales dollar' available to a full-service printer,'' such as the Company (C.P. Exh. 2).

To cope with this competition and to obtain new business not previously available to it, the Company in 1988 or 1989 started a new department called ''Creative Desktop,'' using desktop computers. This replaced some of the conventional publishing functions and required the retraining of some bargaining unit members, artists, typesetters, and strippers, to perform the computer work. Using this newer technology, the Company has been in a better position to retain old and obtain new customers by giving them the choice of desktop or conventional publishing and, if the customers desire, to enable them to supply their own text and graphics on computer disks. (Tr. 90–95, 98, 137–141, 151.)

The volume of work in this desktop publishing department has remained small. Vice President Finley testified (Tr. 94–95) that the revenues in the department increased from ''under \$40,000'' in 1989 to ''approaching half a million'' in 1992 about 2 percent of the Company's 1992 sales, \$24.35 million.

B. *Layoffs Before Union Certification*

Despite the 14.7 percent decline in sales in 1989 (from \$32.07 million in 1988 to \$27.36 million) and a continuing decline in 1990, the Company was able to retain all its 345 employees through April 1990 without any layoffs. In May 1990, however, the Company laid off 18 lithographic production employees and 19 other employees. (R. Exh. 2A; Tr. 55).

The election was held on May 3, 1990, in Case 4–RC–17069. The ballots (a majority for the Union, as later found) were impounded until the Board ruled on the Company's request for review. The Union had filed a representation petition on June 19, 1989; the Regional Director had directed an election on March 29, 1990; and the Company had filed its request for review on April 12, 1990. (G.C. Exh. 2; R. Exh. 1D.)

The Board granted the request for review on May 3, 1990 (R. Exh. 1D), and issued an order on June 11, 1991, affirming the Regional Director's findings. (G.C. Exh. 3A.) On June 14, 1991, the Company filed a motion for reconsideration, which the Board denied on June 28, 1991. (R. Exh. 1D.)

On July 19, 1991, the Regional Director issued a certification of representation (G.C. Exh. 3B).

The Company laid off a total of 44 unit employees and 48 nonunit employees before the July 19, 1991 certification. After the May 1990 layoffs, the Company unilaterally laid off 16 unit and 15 nonunit employees in August 1990, 1 nonunit employee in November 1990, and 10 unit and 13 nonunit employees in June 1991. (R. Exhs. 2A-2C.)

In the absence of an alleged violation, the Company's unilateral layoffs before the certification are not in issue. Compare the often-cited case, *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), in which the Board held (footnote omitted):

> The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes.

C. *Layoffs After Union Certification*

1. Unilateral November 7, 1991 layoffs

a. *Company challenges to the certification*

On July 22 the Union requested that the Company meet and bargain, but the Company refused, wanting judicial review of the unit determination (G.C. Exhs. 7, 11). On August 8, 1991, the Union filed a ''technical'' 8(a)(5) charge against the Company in Case 4–CA–19986 (R. Exh. 1A). The Regional Director issued a complaint on September 16. (R. Exh. 1B.) The Company filed an answer on September 30 (R. Exh. 1C), contending that the certification was invalid ''because of the inappropriateness of the bargaining unit found by the Board and due to the substantial turnover in that unit since the election'' (referring to the Company's unilateral layoffs while the Company's request for review of the Regional Director's unit determination was pending).

On November 1, 1991, the Region filed a Motion for Summary Judgment. (R. Exh. 1D.) On November 6, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause. (R. Exh. 1E.) On November 27 the Union filed a statement in support of the motion (R. Exh. 1F), contending that the bargaining unit is ''a traditional lithographic production unit'' and that ''any delay has been *exclusively* the result of the Company's deliberate efforts to avoid its statutory responsibilities. The Company has availed itself of every denial, appeal, request for review, motion for reconsideration, and request for extension even arguably available to it under the Board's Rules.''

On December 23, 1991, the Board issued its Decision and Order in Case 4–CA–19986, 305 NLRB 903 (1991), finding an 8(a)(5) violation and ordering the Company to bargain. (G.C. Exh. 5.) Refusing to bargain, the Company filed a petition for court review. The Board cross-petitioned for enforcement of its order. On September 9, 1992, the Court of Appeals for the Third Circuit, in a memorandum opinion, enforced the Board's bargaining order, taxing costs against the Company. (G.C. Exh. 7.)

b. *Employees working overtime*

In the meantime on October 24, 1991—a week before the Region filed the November 1 Motion for Summary Judgment in the technical refusal-to-bargain case—the Company received the ''largest job by far in the history'' of the Company. As disclosed by the Company (G.C. Exh. 10), the order was for ''a major full-color textbook for Betz Laboratories which ran to almost $300,000 for one job,'' whereas the ''average job size in 1991'' was $2,885. It was a 2- or 3-month job, which ''was supposed to arrive in June 1991'' and ''be delivered on September 1, 1991.'' When the job belatedly arrived on October 24, it ''created a most unusual demand for very extensive color prep hours,'' and ''As a result of this extraordinary job, all of [the Company's] presses that could be used to print the Betz job and the employees assigned to the presses as well as the prep employees were working considerable overtime.''

Despite this overflow of work, the Company on November 7—before the Board could rule on the Motion for Summary Judgment—unilaterally laid off nine unit employees, consisting of four press department employees, four composition typesetters, and one cameraman. They were Paul Aminde, Martin Bartash, August Franks, Charles Hurlock, John Mahoney, Joseph McCann, Richard McCrea, Anthony Santaniello, and Joseph Seibert. (R. Exh. 2D.)

Before these November 7, 1991 layoffs (the first since the July 19, 1991 certification), there were over 80 employees in the bargaining unit. (Tr. 55; R. Exhs. 2D-2E.)

c. *The Company's admitted reasons for the layoffs*

Both at the time of the layoffs and afterwards (before the trial), the Company admitted that the layoffs were caused by the recession and a severe business downturn in the graphic arts business. The Company also admitted through Floor Superintendent Kirschmann that a reason for making the layoffs was to save on employee benefits, because it was cheaper to lay off employees and have the remaining employees work extra hours on overtime. In addition, as found, the Company in negotiations informed the Union of a competitive disadvantage with incoming printers, because of their lower wage and benefit packages, and ''cut-throat'' competition.

Each of the November 7, 1991 layoff letters read, in part (G.C. Exh. 8):

> I regret to inform you that you will be permanently laid off effective Thursday, November 7, 1991 at the end of your regular shift.
>
> . . . .
>
> This layoff results from a continued *severe business downturn in the graphic arts business that started in late 1988*, and we do not foresee any significant change in the near future. The layoff includes people from almost every department.
>
> *We had hoped that the economy would improve* and are truly sorry we must take this action. As you know, almost every one of our competitors is faced with the same situation. [Emphasis added.]

Local Representative John Potts first learned about the November 7 layoffs when contacted by unit employees that day. (Tr. 31.) On November 19 he requested bargaining on this ''mandatory bargaining'' subject and asked ''that the Company rescind the layoffs and restore the laid-off employees to their positions with full backpay.'' (G.C. Exh. 12.) He received no response (Tr. 33).

On that same day, November 19, Floor Superintendent Darryl Kirschmann held a meeting of foremen and employees in his office. He was then in charge of the pressroom and prep. (Tr. 41–42, 50.) As pressman Herman Long credibly testified about the meeting (Tr. 43–44, 47; G.C. Exh. 16 p. 2):

> Q. Any discussion of overtime?
>
> A. Yes. That was another thing we mentioned because in our department, the press room, everybody was working overtime. . . . And [Kirschmann] did mention that it was *cheaper* for the company *to have a layoff*. Then they *wouldn't have to pay benefits* and keep the *remaining people* there and have them *work extra hours*.
>
> . . . .
>
> Q. In fact, you were running people at overtime?
>
> A. Yes. I believe we were either on 10 hour shifts or 12 hour shifts at that time. [Emphasis added.]

Long's testimony is undisputed. Kirschmann was not called to testify. The Company's only witness, Executive Vice President Finley, denied that Kirschmann was involved in the layoff decisions or in formulating reasons for the layoffs (Tr. 54). Finley did not, however, deny that members of management were informed of the reasons for the layoffs, or deny that Kirschmann's statements to the foremen and employees were correct.

On December 23, 1991, the Union filed the charge in Case 4–CA–20340, alleging in part that the Company violated Section 8(a)(5) by failing and refusing to bargain about the unilateral decision to ''make the layoffs, or about the effects'' of the layoffs. (G.C. Exh. 1A.)

In its response to the charge regarding the reasons for the layoffs, the Company admitted in its position statement to the Regional Office, in part (G.C. Exh. 10 pp. 1–2):

> As a *result of the recession which has hit the Graphic Arts Industry in Philadelphia very hard* as evidenced by the record number of job losses and Chapter 11 bankruptcy hearings in the past three years, the Winchell Company for over eighteen months has had to permanently lay off employees both in and out of the voting unit. The most recent layoff occurred on November 7, 1991.
>
> The order intake, i.e. the orders Winchell receives per week, were sharply reduced as a *result of the impact of the recession*. Attachment No. 1 shows the decline from November 1990 to November 1991. The average for the first six months of this period was $95,000 per day. In the last six months of the period, the daily order intake dropped to $75,000 per day. It is the decline in volume which caused all of the layoffs, including the layoff on November 7, 1991.
>
> . . . .
>
> Winchell operates as a ''huge job shop'' and consequently the flow of work from its wide range of clients is unpredictable. What is predictable is that on average it runs a very large number of small jobs. (The average job size in 1991 at Winchell was $2,885. . . .). [Emphasis added.]

In another position statement to the Region on January 20, 1992 (G.C. Exh. 6), the Company again referred to the layoffs being ''a *result of the recession* which has hit the Graphic Arts Industry in Philadelphia very hard'' (emphasis added).

2. Unilateral June 18, 1992 layoffs

On January 6, 1992, the Union requested that the Company meet to begin bargaining in compliance with the Board's December 23, 1991 bargaining order (G.C. Exh. 13), and

> In addition, we renew our request that you rescind the layoffs which were unilaterally made after certification of this Union as collective bargaining representative, reinstate the laid-off employees to their positions with full backpay, and that you *refrain from any future . . . layoffs without reasonable notice to the Union and an opportunity to bargain about such decisions and their effects*. [Emphasis added.]

Despite the request, the Company continued the downsizing, laying off employees without giving the Union any notice or opportunity to bargain.

On June 18, 1992, the Company gave each of 14 bargaining unit employees, Robert Breslin, Robert Collins, Peter Demers, Paul Groce, Michael Heeney, Edward Jacobs, Gerald Mauloni, Bruce McNeil, John Nearing, Reynold Parker, Leonard Pickar, Robert Poley, Mark Shuster, and Edward Thomas (R. Exh. 2E), a layoff letter, reading in part (G.C. Exh. 9):

> I regret to inform you that you will be permanently laid off effective Thursday, June 18, 1992 at the end of your regular shift.
>
> . . . .
>
> This layoff results from a continued *severe business downturn in the graphic arts business that started in late 1988*, and we do not foresee any significant change in the near future. The layoff includes people from almost every department.
>
> *We had hoped that the competitive pressures* would improve and are truly sorry we must take this action. As you know, almost every one of our competitors is faced with the same situation, and several have gone or are going out of business. [Emphasis added.]

Local Representative Potts' first notice of the layoffs was from unit employees, again on the day of the layoffs (Tr. 34). On June 26 he renewed the Union's demand to negotiate about this ''mandatory bargaining'' subject and asked ''that the Company rescind the layoffs and restore the laid-off employees to their positions with full backpay'' (G.C. Exh. 14).

I note that Vice President Finley testified that since the June 18 layoffs, 1 of the 14 employees, artist John Nearing, has had ''free space'' at the Company. He ''pays nothing for supplies and is free to solicit work from our sales people.'' (Tr. 121.)

On August 17, 1992, the Union filed the charge in Case 4–CA–20987, alleging in part that the Company violated Section 8(a)(5) by failing and refusing to bargain about the unilateral June 18 layoffs or the effects of the layoffs (G.C. Exh. 1J.)

D. *Applicable Precedents*

It is well established, with few limited exceptions, that layoffs are a mandatory subject of bargaining.

As Judge Posner stated for the court in *NLRB v. Advertising Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987),

> After the union was certified as exclusive bargaining representative but before the company signed a collective bargaining agreement with it, the company laid off several workers without first negotiating the layoffs with the Union. The Board found that this was an unfair labor practice, forbidden by section 8(a)(5) of the Act. . . . The company points out that the layoffs were not retaliatory but were motivated by the downward trend in its sales and that collective bargaining agreements invariably authorize the employer to make layoffs when economic conditions warrant. All this is at once true and irrelevant. The rule that requires an employer to negotiate with the union before changing the

> working conditions in the bargaining unit is intended to prevent the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them. . . . Laying off workers works a dramatic change in their working conditions (to say the least), and if the company lays them off without consulting with the union and without having agreed to procedures for layoffs in a collective bargaining agreement it sends a dramatic signal of the union's impotence. . . .
>
> . . . .
>
> *Layoffs are not a management prerogative. They are a mandatory subject of collective bargaining.* Until the modalities of layoff are established in the agreement, a company that wants to lay off employees must bargain over the matter with the union. [Emphasis added.]

One exception is that an employer may justify its failure to bargain over a layoff decision by establishing ''compelling economic circumstances.'' As the Board emphasizes, however, ''only in extraordinary situations will this exception apply.'' *Lapeer Foundry & Machine*, 289 NLRB 952, 954 (1988).

''Compelling economic'' considerations were described in *Angelica Healthcare Services*, 284 NLRB 844, 852–853 (1987), as ''an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'' In that case, the loss of a significant contract that represented about 14 percent of the employer's revenue was found not to be such a ''compelling'' economic consideration. In a more recent case, *Farina Corp*., 310 NLRB 318, 321 (1993), it was held that ''business necessary is not the equivalent of compelling considerations which excuse bargaining.''

Another exception is a management decision that ''amounts to an entrepreneurial decision 'involving a change in the *scope and direction of the enterprise*' and therefore falls outside the ambit of mandatory subjects of bargaining'' (emphasis added). *Tel Plus Long Island*, 313 NLRB No. 47, slip op. at 9 (Nov. 26, 1993) (not reported in Board volumes), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

In *First National Maintenance*, 452 U.S. at 677, 688, the Court ruled that a (third category) management decision to close a part of the employer's business and terminate its contract with a customer

> had as its focus only the economic *profitability of the contract* with the [customer], a concern . . . wholly apart from the employment relationship. This decision, involving a change in the *scope and direction of the enterprise,* is akin to the decision whether to be in business at all [the Court then quoting from Justice Stewart's concurring opinion in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 223 (1964). . . . The decision to halt work at this specific location represented a significant change in [the employer's] operations, a change not unlike opening a new line of business or going out of business entirely. [Emphasis added.]

In the *Fibreboard* concurring opinion, Justice Stewart wrote (379 U.S. at 223):

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the *core of entrepreneurial control*. Decisions concerning the *commitment of investment capital* and the *basic scope of the enterprise* are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. [Emphasis added.]

In *First National Maintenance,* 452 U.S. 676–677, the Court distinguished its first two categories of management decisions:

> Some [first category] management decisions, such as *choice of advertising and promotions, product type and design, and financing arrangements*, have only an indirect and attenuated impact on the employment relationship. . . . Other [second category] management decisions, such as *the order of succession of layoffs and recalls, production quotas, and work rules*, are almost exclusively ''an aspect of the relationship'' between employees. [Emphasis added.]

In its brief (at 20), the Company recognizes that the Court's second category of management decisions (''such as the order of succession of layoffs and recalls, production quotas, and work rules'') ''*gives rise to a statutory bargaining obligation*.'' I note, however, that the Company omits without explanation the key words, ''the order of succession of layoffs and recalls,'' when it refers to this second category of decisions, as follows:

> 2) *decisions such as ''production quotas*'' which ''almost exclusively'' directly deal with terms of employment and for that reason are subject to the limited reach of the statutory bargaining obligation. [Emphasis added.]

In *Holmes & Narver*, 309 NLRB 146 (1992), cited by the Company in its brief (Br. 23–24, 26, 29), the Board relied on those omitted words. In that case, the Board ruled (Br. 146–147) that an employer's decision ''to combine jobs, to reassign work, and to lay off employees'' without making any change that ''significantly altered the scope and direction of its business'' was a mandatory subject of bargaining. The Board held (Br. 147):

> At the outset, we note that our decision here does not purport to establish a rule as to all layoffs. We are dealing with layoffs that are made in connection with a decision to continue doing the same work with essentially the same technology, but to do it with fewer employees by virtue of giving some of the employees more work assignments. . . . Thus, the [employer] did not abandon a line of business or cease a contractual relationship with a particular customer, or *make any other change that significantly altered the scope and direction of its business*. . . .
>
> [W]e are satisfied that the decision at issue here falls within the [second] category of ''management decisions, such as *the order of succession of layoffs and recalls*, production quotas, and work rules,'' that are ''almost exclusively 'an aspect of the relationship' between

> employer and employee''; such a decision is clearly a mandatory subject. [Emphasis added.]

The Board further found in *Holmes & Narver* (309 NLRB 147), that even *if* it were a ''third category'' decision (that ''had as its focus only the economic profitability'' of a contract), ''we would reach the same result.'' It explained (footnotes omitted):

> [T]he decision here did not involve capital investment, did involve labor cost considerations, and, as a common subject of bargaining in industrial practice, is clearly amenable to bargaining. . . . In fact, a recent survey shows that many companies that downsize make efforts to minimize employee separations by implementing a variety of alternatives, which—had the [employer] been willing to bargain—the [union] might have offered as concessions or accepted as proposals. Among the many alternatives to downsizing, other than reduction of wages, are modified work rules, nonpaid vacations, restricted overtime, job sharing, shortened workweek, and reassignment of work and job reclassifications.

Finally, regarding the employer's second category management decision ''to combine jobs, to reassign work, and to lay off employees,'' the Board concluded (Br. 148):

> In sum, we find that the decision impelling the layoff here is a traditional subject of bargaining, properly deemed a mandatory subject without the necessity of inquiries into the impact on labor costs or the [union's] ability to grant wage and benefit concessions.

Therefore a layoff impelled by a second category management decision, as defined in *First National Maintenance Corp.*, supra, 452 U.S. at 677, is a traditional subject of bargaining, without inquiring into whether the decision resulted in a reduction in labor costs, as here.

E. *The Company's Defenses*

1. *Jefferson Chemical* defense

As found, on August 8, 1991, when the Company refused to bargain following the Union's July 19, 1991 certification, the Union filed a so-called technical 8(a)(5) charge in Case 4–CA–19986. After issuing a complaint and receiving the Company's answer, the Region on November 1, 1991, filed a Motion for Summary judgment. On November 6, 1991, the Board issued an order transferring the proceeding to the Board. The next day, November 7, 1991, the Company laid off nine bargaining unit employees. On December 23, 1991, the Board granted the summary judgment motion and ordered the Company to bargain. On the same date, the Union filed the charge in Case 4–CA–20340, alleging the unilateral November 7, 1991 layoffs to be a refusal to bargain in violation of Section 8(a)(5).

Although the technical 8(a)(5) complaint was already before the Board, the Company contends in its brief (Br. 16–17) that ''The November 7, 1991 layoff refusal to bargain charges should have been tried in one proceeding which would have conserved the parties' resources and given early resolution to the issue. . . . The failure to have done so violated the *Jefferson Chemical Co.* doctrine, 200 NLRB 992 (1972).'' Therefore, the Company contends, Case 4–CA–20340 is barred by the *Jefferson Chemical* doctrine.

Thus, the Company contends that Case 4–CA–19986 (the earlier summary motion proceeding) and Case 4–CA–20340 (the November 7, 1991 layoffs request-to-bargain proceeding) should have been tried together, delaying a resolution of the Motion for Summary Judgment and presumably leaving Case 4–CA–20987 (the June 18, 1992 layoffs refusal-to-bargain proceeding) to be tried separately.

I reject the defense as frivolous.

I agree with the Union's contention in its brief (Br. 10) that ''For obvious reasons, *Jefferson Chemical* is not at all applicable to this case.'' Clearly, this proceeding does not involve ''multiple litigation of issues which should have been presented in the initial [summary judgment] proceeding.'' *Jefferson Chemical Co.*, 200 NLRB 992 fn. 3 (1972).

As held in *Adair Standish Corp.*, 283 NLRB 668, 670–671 (1987), it is routine for the General Counsel to file a motion for summary judgment in a technical 8(a)(5) case, which is free of other controverted issues. If the Board grants the motion and the employer will not comply with the Board's cease-and-desist order, the General Counsel petitions a court of appeals for enforcement of the order. Then, in ''what may be anticipated to be a reasonably brief period, the court of appeals will decide whether the Board's certification was faulty or valid.'' The Board in that case approved the severance of a technical 8(a)(5) case from an earlier 8(a)(1), (3), and (5) case, because ''The issue of the right to representation would quite likely be put to rest more quickly; the due process rights of the employer would be fully safeguarded; and the disposition of the remaining allegations would not be affected.''

Similarly in *Jessie Beck's Riverside Hotel*, 231 NLRB 907, 909 (1977), the Board approved a refusal to consolidate a technical 8(a)(5) case with earlier 8(a)(1) and (3) cases, finding that *Jefferson Chemical* was distinguishable and inapposite.

I agree with General Counsel's contention in his brief (Br. 28–29) that

> To require the General Counsel to request that the Board remand the case so that the Regional Director may issue complaint and proceed in a consolidated case before an administrative law judge would only have served to delay resolving the Union's right to represent the [Company's] lithographic production employees. That delay would have prejudiced the . . . employees' statutory right to union representation for no appreciable benefit to the Board and without providing any additional protection of the [Company's] due process rights.
>
> In the event the Board were to conclude that the General Counsel cannot proceed in [Case 4–CA–20340], the Board would provide employers with a powerful tool to delay indefinitely resolving its employees' right to union representation. An employer engaged in a technical refusal to bargain would need to do no more than to continue to violate the Act to frustrate the Board's interest in promptly obtaining an order requiring the employer to bargain.

2. Permanent layoffs defense

The Company contends in its brief (Br. 25) that ''Permanent Layoffs [Are] Not a Mandatory Subject of Bargaining.''

In support of this theory, the Company contends (at 27) that the Board in *Fast Food Merchandisers*, 291 NLRB 897 (1988), ''expressly not[ed] that the layoffs there were permanent, thereby making the layoff decision not bargainable.'' To the contrary, the Board did *not* hold in *Fast Food* that the layoff decision was not bargainable because ''the layoffs there were permanent.'' The Board held instead (291 NLRB at 899–902) that the layoffs *were* linked to the employer's decision to open another distribution center in Jacksonville, Florida, and that the ''General Counsel has declined to argue that the decision producing the layoffs is itself a mandatory subject.'' The Board held that ''because the General Counsel failed to argue that either the opening of the Florida facility or the transfer of work there from LaGrange [Georgia, where the layoffs occurred] was a mandatory subject of bargaining,'' the Board had no basis for granting a reinstatement remedy.

In fact, the Board in *Fast Food* relied in part (291 NLRB at 902 fn. 19) on its decision in *Rocky Mountain Hospital*, 289 NLRB 1370, 1371, 1374 (1988), in which it held that the permanent layoff (or ''termination'') of four employees following a ''drastic decline'' in the patient census was a mandatory bargaining subject. In *Rocky Mountain*, the Board specifically relied on the Seventh Circuit's ruling in *NLRB v. Advertising Mfg. Co*., 823 F.2d at 1090, that ''Layoffs are not a management prerogative.''

Also in its brief (Br. 27) the Company cites the Board's decision in *Lapeer Foundry & Machine*, 289 NLRB 952, 954–956 (1988), which relies as well on the court's ruling in *NLRB v. Advertising Mfg. Co*. that ''Layoffs are not a management prerogative.'' The Company contends that in *Lapeer*, when certain layoffs were converted to permanent layoffs, ''the § 8(a)(5) violation there involved ceased.'' The Company ignores the Board's explanation that when three employees' layoffs ''were converted to permanent layoffs on December 8, their backpay and reinstatement rights shall be cut off as of that date'' because ''the General Counsel did not allege that the unilateral decision to make the layoffs permanent violated Section 8(a)(5) of the Act.''

Apparently alluding to the many Board (as well as court) cases in which layoffs for economic reasons are found to be a mandatory subject of bargaining, regardless of whether they are temporary or permanent layoffs, the Company contends in its brief (Br. 28) that although ''the Board has not articulated the point as clearly as it might, bona fide permanent layoffs are not bargainable.'' It then qualifies that bold contention by adding: ''at least when, by their underlying nature they are the result of entrepreneurial changes to retrench the business or are due to loss of major customers, and hence are, at the same time, nonbargainable underlying decisions and not amenable to temporary fixes via bargaining.''

I reject as untenable the Company's defense that permanent layoffs, as such, are not a mandatory subject of bargaining.

3. Labor costs as factor

Before the trial, as found, the Company (a) informed the Union of a competitive disadvantage caused by incoming printing firms ''with lower wage and benefit packages'' and also a manning problem, (b) informed the Union that Donnelly, one of the major printers that moved into the Philadelphia market, was competing ''very strongly with us for our Vanguard business,'' (c) informed the Union that ''price competition is cut-throat,'' (d) through Floor Superintendent Kirschmann, informed employees who were working much overtime after the November 7, 1991 layoffs that a reason for making a layoff was to save on employee benefits (having the remaining employees work extra hours), and (e) informed employees being laid off on June 18, 1992, that ''We had hoped that the competitive pressures would improve.''

Yet the Company contends in its brief (Br. 4) that the November 7, 1991, and June 18, 1992 layoffs ''were not in any way motivated by the cost of labor or issues relating to the cost of labor,'' and (Br. 32) that the layoffs ''had nothing whatsoever to do with the cost of labor.''

In support of this contention, it cites one answer given on direct examination by its only witness, Executive Vice President Finley (Tr. 54):

> Q. What role, if any, did lower wage rates available elsewhere play in the layoff decision of November '91 and June '92?
> A. None.

I discredit the answer, reject the contention, and find that a reduction in labor costs was a consideration in the layoff decisions.

4. Layoffs a result of business decisions

a. *Shifting positions*

Before the trial, the Company repeatedly admitted that the layoffs resulted from a ''business downturn'' and the ''recession.''

As found, both on November 7, 1991, and June 18, 1992, the Company notified the employees being laid off that ''This layoff results from a continued severe business downturn in the graphic arts business that started in 1988.'' It informed the Regional Office that ''[a]s a result of the recession which has hit the Graphic Arts Industry in Philadelphia very hard . . . in the past three years, the Winchell Company for over eighteen months has had to permanently lay off employees.'' In the same position statement, it asserted that ''[t]he order intake . . . [was] sharply reduced as a result of the impact of the recession.'' In another position statement, it asserted that layoffs were ''a result of the recession which has hit the Graphic Arts Industry in Philadelphia very hard.''

Moreover, the Company admits in its brief (Br. 3) that ''the Company did not bargain over'' the November 7, 1991, and June 18, 1992 layoffs, ''solely due to the pendency of the judicial review of the validity of the certification.''

At the trial, however, the Company contended that it did not bargain over the layoffs because they were not a mandatory subject of bargaining. Vice President Finley testified on direct examination (Tr. 64):

> Q. By Mr. Semler: Were the November '91 and June '92 layoffs bargained with the Union, Mr. Finley?
> A. No, they were not.
> Q. Why not?
> A. Layoffs were the result of business decisions.

The General Counsel argues in his brief (Br. 19) that this company contention ''is a new one and apparently developed only as a matter of trial strategy.'' The Union contends in its brief (Br. 9) that ''the Company has finally realized that economically-motivated layoffs are mandatory subjects of bargaining'' and ''therefore presented entirely *different* reasons for the layoffs.'' The Union also contends (Br. 15) that the fact the Company changed its story ''leads only to the conclusion that its new reasons' are simply pretextual.''

I agree that the Company has adopted shifting positions.

b. *Purported ''business decisions''*

The Company contends in its brief (Br. 14) that the layoffs were a result of the Company's business decisions rather than due to a generalized economic downturn in the printing industry.

The *first business decision*, according to the Company's brief (Br. 4) was ''the decision to no longer compete for financial printing work for Winchell Financial Division, to surrender that market to competitors, and to not commit $4 million capital to a new press necessary to compete for financial market work.''

As found, this contention concerns Vice President Finley's testimony that between 1984 and 1989, four major printers moved into the Philadelphia market. Between 1986 and 1988 the Company considered ''increasing our financial market,'' but found that it was ''financially unappealing'' because it would require the major acquisition of a new web press costing $4 million.

The *second business decision*, according to the Company's brief (Br. 5) was ''the decision to atrophy the Winchell Marketing Company when its Chairman, top salesmen and writers quit and took the bulk of the division's accounts with them, leaving the division as essentially a shell, which lost its last remaining major account in late 1991 as a result of the customer's acquisition of another company.''

This contention concerns the Company's decision not to attempt to rebuild its marketing communications division in late 1988 or early 1989, when the resigning executives took two principal clients with them, leaving the advertising agency in ''shambles.'' It decided instead, in that competitive climate, to attempt to preserve the residual business with its remaining clients. As found, it largely succeeded in 1990 and 1991, but not in 1992, after losing another principal client to another agency.

The *third business decision*, as claimed in the brief (Br. 5), was ''the breach in 1991 of a major 4-year printing contract by the Philadelphia Bar Association, which left the Company staffed for that work in 1991, which never materialized.'' This contention concerns a decision by the bar association—not by the Company—to take its printing business to one of the Company's competitors.

The *fourth business decision*, as claimed (Br. 5), was ''the decision to sell a one-color press due to a shift in market demand to multi-color work.'' This contention concerns the routine sale of a ''very old'' obsolete press, which was used only a ''modest'' amount in 1991 and only ''a shift or two'' (1 or 2 days) in 1992 (Tr. 88–90, 135–137, 149–150).

The *fifth business decision*, as claimed (Br. 5), was ''the decision to enter the desktop publishing field which enabled customers to supply text and graphics on disks, bypassing entirely—and thereby displacing—the performance of that work manually done by members.''

This contention concerns the Company's 1988 or 1989 investment in newer technology, desktop computers, to compete with other printers using the same technology. This ''desktop publishing'' is performed by retrained unit employees. As found, the volume of this desktop work has remained small. The sales grew from ''under $40,000'' to ''approaching half a million'' in 1992, about 2 percent of the Company's 1992 sales, $24.35 million.

F. *Concluding Findings*

1. The circumstances

The Union filed a petition to represent the lithographic production employees in 1989, the year in which the Company's sales declined 14.7 percent. Although the sales continued to decline (another 8.1 percent in 1990), the Company did not begin downsizing its staff of 345 employees until May 1990, the month in which the election was held. Between then and the date the Union was certified as the bargaining representative on July 19, 1991, the Company laid off a total of 44 bargaining unit employees and 48 nonunit employees—over one-fourth of its employees. (These unilateral layoffs are not in issue.)

Despite the well-established rule, with few exceptions, that layoffs after a union certification ''are not a management prerogative'' and ''are a mandatory subject of collective bargaining,'' *NLRB v. Advertising Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987), the Company continued the downsizing without affording the Union an opportunity to bargain about the layoffs. As a superintendent revealed to some of the remaining employees, who were then working much overtime, it was cheaper for the Company to have a layoff and have the remaining employees work extra hours, saving on paying employee benefits.

Although the sales declined only 6.5 percent in 1991 and increased 3.5 percent in 1992 (although still 24.1 percent below the 1988 sales), the Company—without any notice to the Union—laid off 9 bargaining unit employees on November 7, 1991, and 14 unit employees on June 18, 1992. This was a total of 23 additional unit employees laid off after the Union's July 19, 1991 certification, before court enforcement of the Board's bargaining order on September 9, 1992. These layoffs constituted more than one-fourth of the over 80 unit employees working at the time of the certification.

2. Shifting positions

Before the trial on May 24, 1993, the Company repeatedly admitted that the layoffs resulted from a ''business downturn'' and the ''recession.''

At the trial, however, the Company shifted its position and claimed that the ''Layoffs were the result of business decisions.'' In its brief (Br. 14, 29), the Company contends that ''These decisions exclusively accounted for the November 1991 and June 1992 layoffs'' and that the layoffs were not due to a generalized economic downturn in the printing industry.

I find, however, that even if these so-called business decisions caused the layoffs, the decisions are not the type of management decision that ''amounts to an *entrepreneurial decision* involving a change in the *scope and direction of the* *enterprise*' and therefore falls outside the ambit of mandatory subjects of bargaining'' (emphasis added). *Tel Plus Long Island*, above, slip op. at 9 (Nov. 1993), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

The first ''business decision'' was made about 1988, when the Company decided it was ''financially unappealing'' to invest $4 million in a new web press for ''increasing our financial [printing] market'' in the face of greater competition. Obviously the decision *against* making the investment to *increase* its financial market did not involve a change in the scope and direction of the enterprise.

The second ''business decision'' was made *after* the Company failed to retain the loyalty of the chairman, two top sales executives, and two writers in its marketing communications division. The chairman resigned and went to a competitor, and the two executives and two writers resigned and started their own advertising agency in competition with the Company. The resigning executives took two principal clients with them, leaving the agency in ''shambles'' and causing a 63-percent decline in sales, from $4.65 million in 1988 to $1.71 million in 1989.

The Company's decision, in that competitive climate, was *not* to replace the separate chairman and attempt to rebuild the business, but instead to attempt to preserve the residual business with its remaining clients. The resignations caused the loss of business. The Company's business judgment to attempt merely to maintain what was left was not a decision to change the scope and direction of the enterprise.

The third ''business decision'' was not made by the Company. It was the customer, the Philadelphia Bar Association, that decided in 1991 to take its printing business to one of the Company's competitors.

The Company does not contend that the loss of this contract involved ''compelling economic'' considerations for the November 7, 1991 layoffs. The Company's 1990 revenue from the contract totaled $686,000, less that *3 percent* of the Company's 1990 sales, $25.15 million. Compare *Angelica Healthcare Services*, 284 NLRB 844, 852–853 (1987), in which the Board found that ''it has not been shown that the loss of an account representing *14 percent* [emphasis added] of revenue, albeit a significant loss, is the type of 'compelling' economic consideration'' that requires the company to take immediate action without bargaining.

The fourth ''business decision'' was merely a routine decision in 1992 to sell a ''very old'' obsolete press, which was seldom being used. The Company makes no effort to explain how such a sale could be considered a change in the scope and direction of the business.

The fifth ''business decision'' in 1988 or 1989 was to invest in newer technology, desktop computers, to compete with other printers using the same technology. Bargaining unit employees were retrained to perform the ''desktop publishing,'' which has placed the Company in a better position to retain old and obtain new customers. By 1992 this work comprised only a small part of the Company's business, about *2 percent* of its $24.35 million in sales. I find that the investment decision obviously did not change the scope and direction of the business.

Thus, the five ''business decisions'' cannot be considered ''managerial decisions, which lie at the core of entrepreneurial control'' and concern ''the commitment of investment capital and the basic scope of the enterprise,'' in the often-quoted words of Justice Stewart in his *Fibreboard* concurring opinion.

Moreover, even if two 1988 and 1989 decisions—one, not to purchase a $4 million web press to *increase* its financial market and, the other, to attempt to preserve the remaining advertising agency business after the resignations and not attempt to rebuild the agency—could be considered entrepreneurial decisions that changed the scope of the enterprise, those decisions would be irrelevant to a question, years later, of whether the layoffs after the Union's certification were ''a mandatory subject of collective bargaining.''

In the cited *Fast Food* case, 291 NLRB 897, 899–900 (1988), the layoffs at the Georgia facility were ''linked'' to the opening of the new Florida facility, because the elimination of the third shift at the Georgia facility ''was clearly a direct result'' of a substantial transfer of work to the new facility. Here, before the November 1991 and June 1992 layoffs, there were (a) intervening market conditions, (b) the layoff of over a fourth of the employees before the July 19, 1991 union certification, and (c) the Company's decision to continue the downsizing of the business after the certification by laying off another fourth of the bargaining unit, even though the decline in sales slowed in 1991 and the sales increased in 1992.

Largely ignoring the layoff of 44 bargaining unit employees in 1990 and 1991 before the July 1991 union certification, the Company attempted to show at the trial that its ''business decisions'' resulted in the additional 23 layoffs in November 1991 and June 1992. In its brief (Br. 7), however, the Company admits in a footnote that the ''unit employees are not dedicated to specific accounts'' and that although ''the precise number of unit employees by classifications can be pinpointed . . . the exact allocation by consequence of a single business decision is less exact.''

Furthermore, the Company ignores the fact that all the remaining employees were working at the plant before the two layoffs. To eliminate 9 unit employees and later 14 unit employees, the Company was required to combine jobs and reassign work. As the Board found in *Holmes & Narver*, supra, 309 NLRB at 146–147, the employer's decision ''to combine jobs, to reassign work, and to lay off employees was a mandatory subject of bargaining.''

3. Defenses rejected

Although, after certification of a union, ''Layoffs are not a management prerogative,'' but instead ''are a mandatory subject of collective bargaining,'' *NLRB v. Advertising Mfg. Co.*, 824 F.2d at 1090, supra, the Company continued to downsign the business and lay off bargaining unit employees without prior notice to the Union.

I reject the Company's defense that its ''business decisions'' exclusively accounted for the layoffs after the Union's certification as the bargaining representative. As the Company admitted before the trial and as the evidence shows, the November 7, 1991, and June 18, 1992 layoffs resulted from a ''business downturn'' and the ''recession.''

Such employer decisions, ''to combine jobs, to reassign work, and to lay off employees'' without making any change that ''significantly altered the scope and direction of its business'' as in *Holmes & Narver*, supra, 309 NLRB at 146–147, and layoff decisions ''motivated by the downward trend in its sales'' as in *NLRB v. Advertising Mfg. Co.*, supra, 823

F.2d 1086, 1090, are an obvious mandatory subject of bargaining.

Having also rejected the Company's frivolous *Jefferson Chemical* defense, its untenable defense that permanent layoffs are not a mandatory subject of bargaining, and its contention that the postcertification layoffs ''had nothing whatsoever to do with the cost of labor,'' I find that the Company unlawfully laid off lithographic production employees on November 7, 1991, and June 18, 1992, without prior notice to the Union and without affording it an opportunity to bargaining on the layoff decisions and their effects, violating Section 8(a)(5) and (1) of the National Labor Relations Act.

Conclusions of Law

1. By laying off bargaining unit employees on November 7, 1991, and June 18, 1992, without prior notice to the Union and without affording the Union an opportunity to bargain over the layoff decisions and their effects, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. The trial of Case 4–CA–20340 is not barred by the *Jefferson Chemical* doctrine, which is inapposite.

3. The following is an appropriate bargaining unit:

> All full-time and regular part-time lithographic production employees of The Winchell Company at its facility, excluding bindery department employees; production coordinators; proofreaders and computer operators in the photo composition department; letterpress department employees; proofreaders, quality control employees, and litho maintenance employees in the offset prep department; line-up employees and cutters in the sheetfed offset press department and the multilith offset press department; guards and supervisors as defined in the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully laid off 9 bargaining unit employees on November 7, 1991, and 14 unit employees on June 18, 1992, without prior notice to the Union and without affording the Union an opportunity to bargain over the layoff decisions and their effect, it must be ordered to bargain with the Union concerning the layoff decisions, as well as the effects of the decisions, and to offer the employees reinstatement and make them whole for any loss of earnings and other benefits resulting from the unilateral layoffs. *Lapeer Foundry & Machine*, supra, 289 NLRB at 955.

As further required in *Lapeer* (at 955), the Respondent's backpay liability ''shall run from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent positions or have secured equivalent employment elsewhere. Backpay shall be based on the earnings that the employees normally would have received during the applicable period, less any net interim earnings, and shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Any questions concerning compliance with the Board's Order, for example, the Respondent's offer of proof of prior recalls (Tr. 63–64), can be resolved at the compliance stage of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, the Winchell Company, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off bargaining unit employees without notifying Graphic Communications International Union, Local 14-M, AFL–CIO–CLC and affording the Union a reasonable opportunity to bargain about the decision and its effects on the employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the certified representative of the bargaining unit employees concerning the unilateral decisions to lay off employees on November 7, 1991, and June 18, 1992, and the effects of those decisions.

(b) Offer the unilaterally laid-off employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make the employees whole for any loss of earnings and other benefits suffered as a result of the layoffs, in the manner set forth in the remedy section of the decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off bargaining unit employees without giving Graphic Communications International Union, Local 14-M, AFL–CIO–CLC notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning our decisions to lay off bargaining unit employees on November 7, 1991, and June 18, 1992, and the effects of those decisions.

WE WILL offer the laid-off employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the employees whole for any loss of earning and other benefits suffered as a result of the layoffs, less any net interim earnings, plus interest.

THE WINCHELL COMPANY